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March 14, 2001

**VIA FACSIMILE AND HAND DELIVERY**

Hon. Nicholas G. Garaufis  
United States District Judge  
United States Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: ***The European Community v. RJR Nabisco, Inc., et al.*, 00 Civ. 6617  
(NGG); *Department of Amazonas, et al., v. Philip Morris, et al.*,  
00 Civ. 2881 (NGG) (consolidated)**

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Dear Judge Garaufis:

This letter responds to the March 9, 2001 letter to the Court from plaintiffs' counsel, Kevin A. Malone, Esq., renewing plaintiffs' request to take certain non-party discovery despite this Court's discovery stay. While defendants' counsel remain willing to work with plaintiffs' counsel to preserve documents where necessary, Mr. Malone's request seeks authority well beyond that required merely to preserve documents. Therefore, the Court should deny Mr. Malone's request as formulated and should instead authorize plaintiffs' counsel to serve a subpoena on the Bank of America directing that bank to advise the parties whether it has records referenced in Mr. Malone's January 12, 2001 letter to the bank, and further directing that any such records be segregated and maintained pending further order of this Court.

In his letter to the Court, Mr. Malone requests permission “to serve a limited number of subpoenae, in order to preserve the documents for future use and to prevent prejudice to the Plaintiffs’ interests.” Mr. Malone does not identify the documents that plaintiffs propose to subpoena, the entities on which plaintiffs plan to serve subpoenas, or what he means by “prevent[ing] prejudice to the Plaintiffs’ interests.” Mr. Malone proposes that plaintiffs be allowed to serve such subpoenas, without seeking leave of the Court, on “any bank [that] refuses to grant the request to voluntarily preserve the documents . . . .” Such a broad grant of authority would be inconsistent with the stay of discovery that the Court has ordered. The Court should deny such authority until it resolves the questions of whether this Court has subject matter jurisdiction and whether plaintiffs have stated a claim for relief.

Mr. Malone now seeks permission to subpoena records from any bank that refuses to accede to his letter request because Bank of America declined to provide information about the existence of its records. Mr. Malone does not suggest that the parties will be spared unnecessary litigation over the scope of the subpoenas if they are contested by the banks, their customers or other interested parties. Nor does he suggest that he and his colleagues will refrain from reviewing any records provided in response to the subpoena or using the information for purposes other than this litigation. He also does not say that plaintiffs’ counsel will not use such a review as a springboard for seeking discovery of still other documents. Thus, were the Court to grant Mr. Malone’s request, plaintiffs presumably would engage in ongoing discovery even though the Court previously has decided that no such discovery should occur prior to resolution of the motions to dismiss.

Defendants suggest a more limited modification of the current procedure that will address Mr. Malone’s concerns while leaving the discovery stay intact. Specifically, defendants agree with Mr. Malone that, in the first instance, the parties should contact banks that may have pertinent records. Contrary to Mr. Malone’s proposal, however, defendants propose that if any bank, like Bank of America, declines to advise whether such records exist, then either party may ask the Court to approve issuance of a subpoena to that bank requiring the bank to advise both parties whether it has the information and directing the bank to hold any responsive records until further order of the Court. Defendants believe that this proposal will ensure that any arguably relevant bank records are preserved, while at the same time maintaining the current stay of discovery.

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Accordingly, we request the Court to decline to modify the stay of discovery as requested by Mr. Malone.

Respectfully submitted,

/s/ Irvin B. Nathan

Irvin B. Nathan

cc: John J. Halloran, Jr., Esq.  
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